No. 88-562

Supreme Court, U.S.
FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TERRY LEWIS COLE - - - - Petitioner

versus

H. GARY WELLS - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL R. McMAHON
Attorney at Law
306 Legal Arts Building
200 So. Seventh Street
Louisville, Kentucky 40202
(502) 589-4713
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. **Did The Court Below Err In Holding That the State of Michigan Was Not Bound To Apply Its Existing Case Law to Petitioner's Direct Appeal?**

II. **Was the Nondisclosure by the Prosecution of Monetary Rewards Paid to State's Witnesses, Who Gave Material Testimony, a Denial of Petitioner's Rights Secured by the Due Process Clause of the Fourteenth Amendment?**

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
List of Parties	iv
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix A: Order of the United States Court of Appeals for the Sixth Circuit	9
Appendix B: Transcription of the Court Below's Disposition of this Case, Made in Open Court From the Bench Pursuant to 6th Cir. Rule 19	10

TABLE OF AUTHORITIES

Cases: PAGE

People v. *Dietrich,* Mich. App., 274 N.W. 2d 472 (1978) 4
People v. *Dietrich,* Mich., 315 N.W. 2d 123 (1982)... 5
People v *Carter,* 197 N.W. 2d 57 (1972) 5
Brewer v. *Overberg,* 624 F. 2d 51 (6th Cir. 1980)... 5
Bishop v. *Mazurkiewicz,* 634 F. 2d 724 (3rd Cir. 1980) 5
United States v. *Bagley,* 473 U.S. 667, 87 L. Ed. 2d 481, 105 Sup Ct. 3375 (6th Cir. 1985) 6
United States v. *Presser,* 844 F. 2d 1275 (6th Cir. 1988) 6

Other Authorities:

Title 28, United States Code, Section 1254 2
Fifth Amendment, United States Constitution 2
Sixth Amendment, United States Constitution 2
Fourteenth Amendment, United States Constitution. 2

LIST OF PARTIES

The following is a list of all parties involved in this proceeding and their respective counsel:

State of Michigan

Hon. Frank J. Kelley, Attorney General;
Hon. Louis J. Caruso, Solicitor General;
Hon. Edgar L. Church, Jr., Asst. Attorney General,
Corrections Division, Plaza One Building,
401 South Washington Square,
Lansing, Michigan 48913

Terry Lewis Cole

Hon. Michael R. McMahon
Attorney at Law
306 Legal Arts Building
200 So. Seventh Street
Louisville, Kentucky 40202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

TERRY LEWIS COLE - - - - - *Petitioner*

v.

H. GARY WELLS - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The Order affirming Petitioner's conviction entered by the United States Court of Appeals for the Sixth Circuit may be found in Appendix A. A Transcription of the Bench Disposition by the United States Court of Appeals for the Sixth Circuit may be found in Appendix B.

JURISDICTION

The disposition of Petitioner's appeal below, entered by the Sixth Circuit Court of Appeals pursuant to 6th Cir. Rule 19, was announced on May 29, 1988, following oral argument. The final Order itself, entered by the Clerk in accordance with the decision of the panel from the bench, was entered on May 20, 1988. This Petition for Writ of Certiorari was filed within

60 days of that date. Jurisdiction is invoked under the authority of Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

On November 14, 1974, following a Michigan jury trial, Petitioner was convicted of First Degree Felony Murder. Life imprisonment, without the possibility of parole, resulted.

The crime involved the killing of a drug store owner during the course of a robbery attempt.

At trial, the prosecutor relied heavily upon the testimony of two women who had previously lived with Petitioner and his co-defendant. Some time after the trial, Petitioner discovered that these witnesses had been given monetary awards for having testified against him.

One of the central issues at trial was whether or not Petitioner, in shooting and causing the victim's death, had acted with an intent to murder. A good deal of testimonial evidence was adduced which bore upon Petitioner's lack of intent to murder. For example, one witness stated, "Terry [Petitioner] said he was going to rob the man. It was for robbery, and that was it." Another witness testified that the Petitioner had told him, ". . . [W]e didn't mean to shoot him." In his closing argument to the jury, the prosecutor himself acknowledged to the jury that, "[h]e surely didn't want to kill [the victim]." The prosecutor further admitted to the jury that, ". . . we do not have any substantiation that he [Petitioner] is a cold blooded murderer."

Despite this evidence bearing upon Petitioner's lack of malice, and despite supporting case law which existed in Michigan at the time of Petitioner's trial, the trial court refused to instruct the jury on the lesser included offense of either Second Degree Murder or Manslaughter.

Upon a direct appeal of Petitioner's conviction, the Michigan Court of Appeals remanded for an evidentiary hearing regarding the receipt of money by the

prosecution's witnesses. Following the hearing, which resulted in no relief to Petitioner, the Michigan Court of Appeals affirmed on the issue relating to the payments to the witnesses but, because of an instructional error concerning the element of intent, reversed the case and remanded for entry of judgment on the lesser included offense of Manslaughter. *People* v. *Dietrich*, Mich. App., 274 N.W. 2d 472 (1978).

The Michigan Supreme Court, however, reinstated Petitioner's original Felony Murder conviction. *People* v. *Dietrich,* Mich., 315 N. W. 2d 123 (1982).

Next, Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court. Denying relief, that court held *inter alia* that the offer of a reward is not the type of exculpatory evidence contemplated by *Brady* and its progeny and, further, that since there was no evidence of a lesser degree of felony murder, failure to instruct on a lesser included offense did not prejudice Petitioner's Constitutional rights. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's Order dismissing Petitioner's Petition for Writ for Habeas Corpus.

This instant action followed.

REASONS FOR GRANTING THE WRIT

I.

The state of the law in Michigan at the time of Petitioner's trial in 1974 clearly provided that if the evidence was subject to different interpretations that would justify a finding of a lesser offense, a charge as

to such lesser offense should be given. See *People* v. *Carter,* 197 N. W. 2d 57, 69 (1972). In the instant case there was ample evidence, as set forth in the statement of facts herein, that would have allowed a reasonable minded jury to conclude that Petitioner might have been guilty of Second Degree Murder or even of Manslaughter. Yet the trial court refused Petitioner's request for an instruction on a lesser included offense of Felony Murder.

To be sure, the jury might have found Petitioner guilty as charged, not because he was guilty and proven so, but because the jury was not given the opportunity to find him guilty of some lesser offense. Under these circumstances Petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution.

Federal Courts have jurisdiction to review the State Courts' refusal to instruct on a lesser offense if a failure to give the instruction deprives the defendant of due process. *Brewer* v. *Overberg,* 624 F. 2d 51, 52 (6th Cir. 1980); *Bishop* v. *Mazurkiewicz,* 634 F. 2d 724, 725 (3rd Cir. 1980).

The District Court erroneously concluded that there was no evidence to have warranted a lesser offense instruction. The United States Court of Appeals for the Sixth Circuit, in upholding the District Court, declined to intervene and require the State of Michigan to apply its own existing precedent to Petitioner's case. This Court should therefore grant this Writ of Certiorari to review the judgment below.

II.

The Court below, in affirming the District Court's decision in this case, held that the offer of a reward is not the type of exculpatory evidence contemplated by *Brady* and its progeny. However, this Court has recently held that undisclosed impeachment evidence, such as the "type" at issue here, is an error of constitutional magnitude if the evidence might have been helpful in cross-examination. *United States* v. *Bagley,* 473 U.S. 667, 87 L. Ed. 2d 421, 105 Sup Ct. 3375 (1985). See also *United States* v. *Presser,* 844 F. 2d 1275 (6th Cir. 1988).

Clearly, had Petitioner known at trial of the monetary awards that had been paid to the two material witnesses, he could have effectively impeached their testimony. Thus, there is a reasonable probability that the results of the trial would have been different. The reliability of these two witnesses may well have been determinitive of guilt or innocence.

As the foregoing discussion demonstrates, the prosecution's failure to disclose the fee arrangements to the witnesses to Petitioner unconstitutionally deprived him of a fair trial. The nondisclosure of this *Brady* material plainly undermines confidence in the result of Petitioner's trial. Accordingly, this Court should grant this Writ of Certiorari to review the judgment below.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue to review the judgment below.

Respectfully submitted,

MICHAEL R. MCMAHON
Attorney at Law
306 Legal Arts Building
200 So. Seventh Street
Louisville, Kentucky 40202
(502) 589-4713

Counsel for Petitioner,
Terry Lewis Cole

APPENDIX

APPENDIX A

No. 87-1670

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERRY LEWIS COLE, - - - *Petitioner-Appellant*

v.

H. GARY WELLS, - - - - *Respondent-Appellee*

ORDER—Filed May 20, 1988

BEFORE: MERRITT and KENNEDY, Circuit Judges, PECK, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be, and it hereby is affirmed upon the opinion of that court.

Entered By Order of The Court
John P. Hehman, Clerk
(s) John P. Hehman

APPENDIX B

Transcript of the Court Below's Disposition of this Case, Made in Open Court From the Bench Pursuant to 6th Cir. Rule 19

JUDGE MERRITT: Counsel, the Court is going to disclose and decide this case under Rule 19 of the Rules of the Court which provides that if the panel is unanimously of the view that a written opinion by one of the members of the panel is unnecessary to the disposition of the case that the Court may rule on the case from the bench. And, under that Rule the transcript of the Court's ruling as well as the oral argument in the case will be available from the Clerk's office, the arguments and the Court's remarks are available to counsel in case counsel wants to use them for any purposes or any other pleadings. Basically in this case, we think that the Judgment of the District Court should be affirmed for the reasons set out in the Magistrate's report to the District Court. The issues that you raised concerning retroactivity and manslaughter and a felony murder rule are issues of State law and would become Federal issues only to the extent that it could be said under *Windship, Windship* case and other cases that the State has established a particular element of the crime which was not proved. That's not really the basic argument here and we do not see that that is the case. So on that series of State Law issues which you are attempting to erect into Federal Law issues, and we understand why you are trying to do that but we don't agree that they raise any significant Federal Law issue. The only issue in the case which, it seems to me is a little troublesome, is the *Brady* issue and it was deal with by the Magistrate by saying essentially that the State trial court had found and that the Magistrate and the District Judge also found that

under the facts of this case regarding the reward that the information in question was not material within the meaning of materiality as the Supreme Court has defined it in a series of cases after *Brady,* and in *Brady* itself. For example, in *Brady,* quoting there, *Brady* says that "a majority of this Court has agreed"; no, excuse me, this is in the most recent Supreme Court case, *Pennsylvania* v. *Ritchie,* which is a 1987 case; "a majority of this Court has agreed evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. A reasonable probability is a probility sufficient to undermine confidence in the outcome." Now here, it was a public matter to begin with. There is no reason to believe, based on this record, that this disclosure would have made any difference in the outcome, and the State Court has so found and the Magistrate and the District Court have agreed; if we were of the view that that was a mistake under Section 2254, Title 28, then we would be obligated to set that finding, to the extent that it is a finding of fact, aside, but the Court is not of the view that it could find that that finding is a mistake or that the ruling, the legal ruling on the basis of that finding is in error. And so for those reasons the Court will affirm the Judgment of the District Court. My colleagues may have something else to add to the . . . With that, the Judgment of the District Court will be affirmed.